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DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

[Protest Against Two-Step Procurement Conducted by Army]

FILE: B-199371

DATE: February 4, 1981

MATTER OF: Applied Devices Corporation @ D601128

DIGEST:

1. Protest filed within 10 working days of receipt of amendment reflecting remarks in proposal conference is timely where it is not clear on record that discussion in preproposal conference included statement of position clearly adverse to pending protest to agency. Doubt as to timeliness is resolved in favor of protester.
2. Experience-based special capability requirements are legitimate bases for measuring technical acceptability in first step of two-step formally advertised procurement where they reflect legitimate and reasonable concern that only experienced manufacturer could produce and deliver complex equipment within acceptable time.
3. Although offerors' risk is increased by burden of developing and producing or otherwise obtaining complex components for which "build-to-print" drawings were unavailable, offerors are expected to account for such risk in computing offers and mere presence of risk does not make solicitation improper. Government is not obligated to compensate for different levels of risk aversion among competitors.
4. Government is not obligated to equalize competitive advantage which accrues to one competitor by virtue of its own efforts under prior contract for foreign government.

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On June 26, 1980, Applied Devices Corporation filed a protest with our Office against a two-step formally advertised procurement being conducted by the Department of the Army for the purchase of laser rangefinders and rangefinder test sets. As explained below, we find Applied Devices' protest to be without merit.

The initial solicitation for this procurement, a request for technical proposals (RFTP), was issued on April 9, 1980, as the first step in the purchase of AN/GVS-5 laser rangefinders originally developed by RCA. The technical data package included with the solicitation incorporated a number of drawings but excluded others referred to in the data package. In addition, some of the drawings supplied were lacking in detail because RCA declined to provide the Army with detailed drawings for components which had been developed at RCA's own expense. RCA would not quote on these components to other offerors. The RFTP permitted offerors to either buy from an alternate source or design and make those components for which detailed drawings were omitted, but required qualification testing of the components prior to production of the first rangefinder. The RFTP also contained special capability requirements which required bidders to have a history of successful manufacture of pulsed solid-state laser rangefinders or similar devices to military or equivalent specifications. As the result of a modification, bidders could meet this requirement through subcontracting. The closing date for receipt of technical proposals was June 27, 1980. Five offerors submitted proposals; Applied Devices did not submit a proposal.

Applied Devices protested to the contracting agency on May 5, 1980, that the special capability requirements unduly restricted competition and on May 15, 1980, that the technical data package was defective because RCA refused to quote on the components for which the drawings were lacking in detail; Applied Devices contended that the absence of "build-to-print" drawings effectively converted the solicitation to a sole source to RCA. Because of these and similar questions raised by other offerors, the Army

held a preproposal conference on May 29, 1980, in which it was stated that offerors could make or buy those components for which RCA would neither quote nor provide detailed drawings, as provided in the solicitation, and that compliance with the special capability requirements was mandatory but could be accomplished through subcontracting in accordance with Defense Acquisition Regulation § 1-906 (1976 ed.). Representatives of Applied Devices attended this conference. The Army's remarks at the conference were reflected in an amendment to the solicitation dated June 9, 1980.

Applied Devices' protest to our Office raises substantially the same issues that Applied Devices raised in its earlier protest to the Army. Where a protest has been filed initially with the contracting agency, our Bid Protest Procedures require that "any subsequent protest to the General Accounting Office [be] filed within 10 working days of formal notification or actual or constructive knowledge of initial adverse agency action." 4 C.F.R. § 20.2(a) (1980).

The timeliness of Applied Devices' protest has been questioned on the basis that the Army's adherence during the preproposal conference on May 29 to a position adverse to Applied Devices' pending protests constituted initial adverse action within the meaning of our procedures and Applied Devices did not file its protest with our Office within 10 working days of the conference.

The record is not conclusive on this question. Although it is apparent that the Army discussed the aspects of the solicitation to which Applied Devices objected during the preproposal conference, and it may well be that the Army's statements reflected adherence to a position adverse to Applied Devices' protest, we cannot say with certainty that this is the case. In this connection, we note that the Army did issue an amendment to the solicitation on June 9 which modified some of these same provisions and Applied Devices' protest to our Office was filed within 10 working days of its receipt of this amendment and prior to the date set for receipt of technical proposals. We resolve doubt as to the timeliness of a protest in favor of

the protester. Dictaphone Corporation, B-196512, September 17, 1980, 80-2 CPD 201; Memorex Corporation, 57 Comp. Gen. 865 (1978), 78-2 CPD 236. Accordingly, we will consider Applied Devices' protest on the merits.

We do not agree with Applied Devices' assertion that the special capability requirements unduly restricted the competition and constituted an unreasonable prequalification. The first step, calling for technical proposals, in a two-step formally advertised procurement is similar to a negotiated procurement in which we have held that traditional responsibility criteria, such as experience and capability, may be legitimate bases for assessing technical acceptability. Joule Technical Corporation, B-197249, September 30, 1980, 80-2 CPD 231; Exide Power Systems Division, ESB Inc., 57 Comp. Gen. 653 (1978), 78-2 CPD 106. The AN/GVS-5 determines the distance to a target by measuring the time it takes for a narrow and well-defined beam of energy to be transmitted to the target and reflected back. The quality of the laser transmitting element of the AN/GVS-5 is critical, requiring exceptional production and quality control measures in excess of those required for the successful manufacture of receive-only devices. We think the special capability requirements reflect the Army's reasonable and legitimate concern that only a bidder with successful experience in the manufacture of the AN/GVS-5 or like items could implement the necessary controls and produce the AN/GVS-5 in sufficient time to meet the Army's delivery requirements.


Although not phrased in terms of risk, Applied Devices' assertions of undue prejudice attributable to insufficiently detailed and/or missing drawings in the technical data package are, in essence, little more than objections to the business uncertainties in this procurement. We recognize, as did the Army, that the unavailability of "build-to-print" drawings for all of the components in the AN/GVS-5, particularly those employing complex chip technology, placed a substantial burden on potential offerors to develop and produce or otherwise obtain compatible components. Bidders or offerors are expected, however, to take such uncertainties into account in the computation of their

bids or offers and the mere presence of risk in a procurement does not make the solicitation improper. Consolidated Maintenance Company, B-196184, March 18, 1980, 80-1 CPD 210; Palmetto Enterprises, 57 Comp. Gen. 271 (1978), 78-1 CPD 116. Furthermore, the fact that several competitors submitted technical proposals leads us to believe that not everyone found the risk in this procurement to be as unacceptable as Applied Devices and we know of no obligation on the part of the Government to compensate in its procurements for the different levels of risk aversion which various competitors might experience.

We note in this latter connection that the Army did try to ameliorate some of the risk in this procurement when it advised offerors that some of the missing drawings, pertaining to the production and quality control equipment for the AN/GVS-5 test sets, would be furnished for the second (pricing) step of the procurement and were not necessary for the submission of an acceptable technical proposal. Despite Applied Devices' assertions to the contrary, we think it clear that the Army both recognized the uncertainty created by the lack of these drawings and indicated that the offerors' technical proposals would not be penalized for a lack of this specific knowledge. Applied Devices has not persuaded us of how it might have been prejudiced by this approach.

Last, Applied Devices alleges that RCA has an unfair competitive advantage because RCA will not have to invest in the development effort needed to produce the components for which the drawings were omitted from the technical data package. Although we agree that RCA might have a competitive edge in this procurement, we attribute it to RCA's own efforts in the performance of a prior contract for a foreign government rather than to any preference or unfair action by the Army. The Government is not required to equalize this type of competitive advantage. Western Design Corporation, B-194561, August 17, 1979, 79-2 CPD 130; ENSEC Service Corp., 55 Comp. Gen. 656 (1976), 76-1 CPD 34.

The protest is denied.

A handwritten signature in dark ink, reading "Milton J. Aorlan". The signature is written in a cursive style with a large, stylized initial "M".

For the Comptroller General
of the United States